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In the Supreme Court of the United States

October Term, 1984

WILTON JOHNSON,
Petitioner,
vs.
CONSOLIDATED RAIL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Did defendant, as a matter of law, fail to offer sufficient evidence of contributory negligence to create a jury issue?

2. Did an instruction which specifically prohibited the jury from any speculation, conjecture or surmising violate the legal standards under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 and following?

3. Where injury is caused by damaged spikeheads breaking off and where the only evidence as to the cause of that damage is that a railroad derailment occurred involving Conrail equipment, on Conrail tracks, totally within the possession and control of Conrail, does it present an issue requiring a charge of res ipsa loquitur?

TABLE OF CONTENTS

Questions Presented for Review I
Table of Authorities III
Opinions Below 1
Jurisdiction of the Court 2
Statutes, Regulations and Rules 2
Statement of the Case 3
Argument 5

A. Question One 5
B. Question Two 7
C. Question Three 9

Appendices:

Opinion of the United States Court of Appeals for the Seventh Circuit (unreported), Case No. 81-C-205, decided September 5, 1984 ..... A1
Judgment for plaintiff, United States District Court for the Northern District of Indiana, Case No. S81-205, Dated June 30, 1982 ..... A9
Order of the United States District Court for the Northern District of Indiana denying plaintiff's motion for new trial, Case No. S81-205, Dated July 15, 1982 ..... A10
Judgment of the United States Court of Appeals for the Seventh Circuit Case No. 81-C-205, Dated September 5, 1984 ..... A16
45 U.S.C. § 51 ..... A17
45 U.S.C. § 53 ..... A18
45 U.S.C. § 54 ..... A18

Trial court's instruction on no speculation A19
Trial court's instruction on contributory negligence A19

TABLE OF AUTHORITIES

Cases

Chapin v. Rogers, 459 P.2d 846 11
Jesionowski v. B & M Railroad Co., 329 U.S. 452 (1947) 10, 11
Lavender v. Kurn, 327 U.S. 645 (1946) 7, 8, 9
Mumma v. Reading Co., 247 F. Supp. 252 (1965) 6
Rivera v. Farrell Lines, Inc., 474 F.2d 255 (1973) 6
Rogers v. Missouri-Pacific R. Co., 352 U.S. 500 12
Sweeney v. Erving, 228 U.S. 233 (1913) 10, 11
Tiller v. Atlantic Coastline Railroad, 318 U.S. 54 (1943) 6

Statutes

45 U.S.C. §§ 51 et seq., Federal Employers' Liability Act 2, 3, 4, 7
45 U.S.C. § 51 2
45 U.S.C. § 53 2
45 U.S.C. § 54 ..... 2, 5

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OPINIONS BELOW

Petitioner, Wilton Johnson, prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the opinion (Appendix A1) and judgment (Appendix A16) of that court entered on September 5, 1984, in Case No. 82-2246. That opinion and judgment affirmed the judgment entered in the United States District Court for the Northern District of Indiana, South Bend Division, in Case No. 81-C-205 entered on a jury verdict in favor of petitioner and against respondent (Appendix A9) and the order of the District Court overruling petitioner's motion for new trial (Appendix A10).

JURISDICTION OF THE COURT

The judgment of the United States Court of Appeals for the Seventh Circuit of which review is sought was entered on September 5, 1984.

In the action filed and tried herein, petitioner set up a claim involving the following statute of the United States, to-wit, the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq.

Jurisdiction to review the said judgment of the United States Court of Appeals for the Seventh Circuit by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254, which provides in portions pertinent to this petition:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

STATUTES, REGULATIONS AND RULES

The statutes involved in this petition for review are certain sections of the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. The following sections are pertinent to the petition: 45 U.S.C. § 51 (Appendix A17); 45 U.S.C. § 53 (Appendix A18); and 45 U.S.C. § 54 (Appendix A18).

STATEMENT OF THE CASE

This action was filed and tried under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq., in the United States District Court for the Northern District of Indiana, South Bend Division, No. S81-205. In his complaint, petitioner, Wilton Johnson, alleged that while he was employed as a trackman for the respondent, Consolidated Rail Corporation, on December 1, 1980, he suffered injuries caused in whole or in part by the negligence of the respondent. The jurisdiction of the trial court was not in dispute. Respondent in its answer denied that the respondent was negligent or that any negligence of the respondent caused the petitioner's injuries. Respondent alleged that the sole cause of petitioner's injuries was petitioner's violation of respondent's safety rules and further, that petitioner's injuries were caused and contributed to by the contributory negligence of the petitioner.

At the trial the evidence established that petitioner had suffered back injuries and underwent surgery prior to the accident of December 1, 1980, and subsequently returned to work as a timekeeper and machine operator until November, 1980, when he was furloughed. The only job position then available to petitioner was that of trackman, onto which job he bumped. Petitioner was assigned to lift spikes damaged by the derailment of a train in the exclusive control and possession of respondent on respondent's tracks. Due to the extent of the damage to the spikes, they had to be removed by hand instead of by use of a hydraulic spike lifter. The procedure followed was one man holding a spike lifter while the other swung a 12 pound sledge hammer to drive the spike lifter under the head of the damaged spikes. Petitioner performed his duties swinging the 12 pound sledge hammer 50% of the

time and holding the spike lifter the remainder of the time. One to two spikeheads out of every tenth spikehead broke off causing the sledge to forcefully continue through its arc causing a severe jarring impact on petitioner's back and resulting in injury to his back.

The District Court gave an instruction on contributory negligence to which petitioner objected. Respondent did not offer any form of evidence indicating petitioner's contributory negligence. The District Court further gave an instruction prohibiting the jury from any speculation, conjecture or surmise to which petitioner strenuously objected as a violation of the legal standard under the Federal Employers' Liability Act. The District Court denied petitioner's requested instruction to the jury on res ipsa loquitur.

Evidence amounting to $430,000.00 of undisputed damages was presented and the jury awarded $95,000.00 total damages, reduced by 75% contributory negligence, thus rendering a verdict of $23,750.00 for petitioner.

Petitioner filed motion for new trial with memorandum in support presenting the following grounds: (1) the trial court erred in giving an instruction on contributory negligence as the respondent failed to offer sufficient evidence of contributory negligence to create a jury issue; (2) the trial court erred in giving an instruction which specifically prohibited the jury from any speculation, conjecture or surmising; and (3) the trial court erred in denying petitioner's requested instruction on res ipsa loquitur. The trial court overruled petitioner's motion for new trial (Appendix A10).

On appeal to the United States Court of Appeals for the Seventh Circuit, the Court of Appeals affirmed the judgment and order of the District Court (Appendix A16).

ARGUMENT

A. Question One

Respondent, as a matter of law, failed to offer sufficient evidence of contributory negligence to create a jury issue. Respondent failed to introduce any evidence of contributory negligence on the part of petitioner. Nowhere in the evidence was there any testimony that petitioner did anything wrong. Respondent's attorney on cross-examination alluded to some safety rules but never put them into evidence or had the specific rule read. There was no evidence that petitioner violated any such safety rule. Neither was there any evidence as to what was or was not a proper way to swing a sledge hammer.

The only evidence produced by respondent to assess fault to plaintiff was that petitioner was willing to do the work required of a trackman. The job of trackman was the only job available to petitioner after he had lost his job as a machine operator. He was injured while performing the duties of a trackman and there was no evidence that he performed those duties in a careless fashion. This amounts to nothing more than assumption of risk which is no defense in a Federal Employers' Liability Act action, 45 U.S.C. § 54. This statute reads as follows:

> In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employ-

ment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

The importance of this statutory edict was emphasized by the U. S. Supreme Court when it held that "the defense of assumption of risk has been abolished by statute . . . indeed, every vestige of the doctrine obliterated." *Tiller v. Atlantic Coastline Railroad,* 318 U.S. 54 (1943). In *Mumma v. Reading Co.,* 247 F. Supp. 252 (1965), the court held that "Knowledgeable acceptance by employee of dangerous condition when such acceptance is necessary for performance of his duties is 'assumption of risk . . . .'" The court further held that when an employee would have been compelled to quit his job to avoid a dangerous condition or risk and because of that dangerous condition or risk he was injured, such employee is, as a matter of law, free of contributory negligence. Such was the situation in petitioner's case. He would have been compelled to quit the one job available to him, that of trackman, to avoid the dangerous condition and risks of that position.

In the similar case of *Rivera v. Farrell Lines, Inc.,* 474 F.2d 255 (1973), the court stated that the defense of the case was primarily that the plaintiff was "injured as a result of his own contributory negligence, principally consisting of his continued work in the pantry despite his being well aware of the dangerous condition of the floor." This is likened unto the situation where petitioner voluntarily bumped onto the trackman's job, which was the only job available to him, and continued to work in that dangerous environment. The court in that case held that the defendant failed to present any evidence of contributory negligence and as such the court erred in charging the jury on contributory negligence when in essence the defendant

was arguing assumption of risk. Here respondent has presented an assumption of risk argument, and as such the trial court erred in giving an instruction on contributory negligence.

The trial court's order denying plaintiff's motion for new trial was based in part on facts that were not in evidence in this case. The court stated that the jury could have properly concluded petitioner was 75% negligent based on testimony as to the proper way to swing a sledge hammer and safety rules in regard to the proper way to brace oneself when swinging a sledge hammer. However, no such evidence was ever produced at the trial. The basis for the decision is in error as it is based on something that is not and was not in evidence.

B. Question Two

The Court of Appeals upheld the District Court's instruction No. 18 which read in its pertinent part as follows:

> The law does not permit you to guess or speculate as to the cause of the result in question. A verdict based upon mere possibilities, conjecture or surmises would violate the oath which you have taken as jurors in this case. (Appendix A19)

This instruction was strenuously objected to at the time of trial and over plaintiff's objection the Court charged the jury as above.

The case of *Lavender v. Kurn*, 327 U.S. 645 (1946), has clearly stood for the proposition that such a charge would be in error since 1946. It is one of the leading cases dealing with the issues under the Federal Employers' Liability Act.

In that case an employee was found deceased alongside the railroad track with an unexplained hole in his head.

Basically the facts were that there was a mound, which *if* the decedent had been on that mound at the time a train with a mail car came by, there was a mail hook which *if* that hook was caused to sway out from the car at the same time it passed over the mound, it may well have struck the decedent in the head causing the hole in the head and his ultimate death.

A jury verdict was in favor of the plaintiff. The Supreme Court of Missouri reversed the decision and held that "all reasonable minds would agree that it would be *mere speculation and conjecture* to say that Haney was struck by the mail hook" and that "plaintiff failed to make a submissible case on that question." (emphasis added)

The U. S. Supreme Court granted certiorari and in reversing the Supreme Court of Missouri and remanding the case held that:

> Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, *a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute* by choosing what seems to them to be the most reasonable inference. Only when there is a *complete absence of probative facts to support the conclusion reached does a reversible error appear.* (emphasis added)

Lavender v. Kurn, 327 U.S. 645 (1946).

In the body of their opinion they went on to say:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute . . . a measure of speculation and conjecture

> is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.

Lavender v. Kurn, 327 U.S. 645 (1946).

Clearly then, the U. S. Supreme Court has said that *there is a level of speculation and conjecture that a jury must go through in their duty* to be the fact-finders in a case. Therefore, to have a trial judge instruct a jury that "the law does not permit you to guess or speculate as to the cause of the result in question. A verdict based upon mere possibilities, conjecture or surmises would violate the oath which you have taken as jurors in this case," is indeed in conflict. *Lavender v. Kurn*, 327 U.S. 645 (1946). Therefore, the court erred both when it gave the instruction No. 18 referenced above as well as when it denied plaintiff's motion for new trial on that basis.

C. Question Three

The Court of Appeals upheld the District Court's refusal to give an instruction on res ipsa loquitur.

The only evidence on the record as to why plaintiff, Wilton Johnson, was injured on December 1, 1980, is that the heads of the spikes had been damaged by a derailment which caused many of them to break off as he would swing the sledge hammer and attempt to lift them in preparation for the hydraulic spike lifter to pull them out of the ties.

The only evidence on the record is that the derailment occurred on defendant Conrail's tracks, by defendant Conrail's rolling stock, which tracks and rolling stock were in the exclusive possession and control of defendant. It is within the realm of common knowledge that derailments do not occur as a natural experience of railroading in the absence of some negligence. There also was no evidence

offered that plaintiff, Wilton Johnson, in any way contributed to that derailment.

The derailment caused an increased hazardous duty of having to remove smashed spikeheads by hand instead of the hydraulic spike lifter which would normally perform the task but could not grasp the spikes on this given occasion due to the damage to the spikeheads.

Under the decisions of *Sweeney v. Erving*, 228 U.S. 233 (1913), and *Jesionowski v. B & M Railroad Co.*, 329 U.S. 452 (1947), plaintiff was entitled to an instruction on the application of the doctrine of res ipsa loquitur.

The court in *Jesionowski v. B & M Railroad Co.*, 329 U.S. 452 (1947), dealt with a death which resulted in part from a derailment. The court in speaking of derailments stated "Derailments are extraordinary, not usual, happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence." *Id.* at 458. Thus, the requirement under res ipsa loquitur that a fair inference of negligence can be inferred from the occurrence has been satisfied.

This court in the same decision said that res ipsa loquitur properly applied to a man who was killed as a result of such a derailment even though he may have been one of the causative factors. This is a much broader scope than what is necessary to apply in the Wilton Johnson case. The court stated:

> Res ipsa loquitur, thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, even though it was proved that his operations

> of the things under his control did not cause the accident. This viewpoint unduly restricts the power of juries to decide questions of fact, and in this case the jury's right to draw inferences from evidence and the sufficiency of that evidence to support a verdict are federal questions.

Id. at 457.

Clearly, res ipsa loquitur should be applied in this case as plaintiff had absolutely nothing to do with the derailment, and indeed an inference of negligence can well be drawn from the fact that there was a derailment which caused the spikeheads to be so damaged that the spike lifter could not operate and Wilton Johnson was required to attempt to lift them by hand by use of a sledge hammer with full knowledge that the spikeheads would break off in such damaged condition.

This court stated that there are three conditions necessary for the application of the doctrine of res ipsa loquitur: (1) the accident must be of a kind which ordinarily does not occur in the absence of one's negligence; (2) it must be caused by the agency or instrumentality within exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of plaintiff. See also, *Sweeney v. Erving*, 228 U.S. 233 (1913); *Chapin v. Rogers*, 459 P.2d 846.

The facts in Wilton Johnson clearly support: (1) that the derailment that caused the hazardous condition of mushroom spikeheads was indeed the type of accident that does not normally occur without someone's negligence; (2) occurred with instrumentalities totally within the control of the railroad defendant; and (3) plaintiff had no role whatsoever in bringing that condition about.

On that basis then, a res ipsa loquitur instruction should have been given to the jury in this case and its denial was prejudicial to the effect of the verdict.

In other words, if such an instruction were given, the jury would have been entitled to infer that the defendant was negligent in that respect. Under the law of *Rogers v. Missouri-Pacific R. Co.*, 352 U.S. 500, such an inference of negligence if found to have played any part even in the slightest in injuring the plaintiff, could be utilized to determine the percentage of negligence of the railroad and thereby reduce significantly the finding of contributory negligence that the jury made in this case. The prejudicial effect of this error is clearly demonstrated.

Stated another way, the failure to charge on the issue of res ipsa loquitur reduces the potential quantum of defendant's negligence and thus under a comparative negligence statute, the plaintiff's contributory negligence is correspondingly increased.

Therefore, for the above stated reasons this Court should grant review on writ of certiorari.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Decided September 5, 1984)

No. 82-2246

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BEFORE

HON. WALTER J. CUMMINGS, *Chief Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. JESSE E. ESCHBACH, *Circuit Judge*

WILTON JOHNSON,
Plaintiff-Appellant,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

ORDER

Plaintiff Wilton Johnson brought this action pursuant to the Federal Employer's Liability Act ("FELA"), 45

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*After preliminary examination of the briefs, the Court notified the parties that it had tentatively concluded that argument would not be helpful in this case. The notice provided that any party might file a "Statement as to Need for Oral Argument." Plaintiff filed such a statement. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

U.S.C. §§ 51-60 (1982), to recover for personal injuries sustained while employed by defendant Consolidated Rail Corporation ("Conrail"). Following a jury trial, judgment was entered in favor of plaintiff in the amount of $23,750.00. The district court denied plaintiff's timely post-judgment motion for a new trial, and it is from that order that plaintiff appeals. We affirm.

I.

Plaintiff worked for Conrail as a maintenance man, timekeeper, or machine operator from 1975 to November, 1980. In November, 1980, plaintiff was furloughed as a machine operator. He had sufficient seniority, however, to obtain a position as a trackman. On December 1, 1980, plaintiff and a co-worker were assigned to lift manually and remove rail spikes which had been damaged during a train derailment. Ordinarily, they would have used an hydraulic spike lifter to remove the damaged spikes but the rails were too severely damaged. Instead, the two men had to use a 12-pound sledge hammer and a spike lifter. The two men took turns swinging the sledge hammer and holding the spike lifter. Approximately ten to twenty percent of the damaged spike heads broke off when struck by the sledge hammer. When the spikes broke, both workers were jarred and caused to move forward. Working in this manner, plaintiff removed spikes from approximately 2,640 ties.

On December 2, plaintiff reported to work and informed his foreman that he had injured his back while removing the spikes the previous day. The evidence at trial showed that plaintiff had suffered a herniated disc and a collapsed disc. Plaintiff had previously sustained two back injuries while working for defendant, in November 1975 and in January 1977, each of which required sur-

gery and together resulted in plaintiff's inability to work for 14-15 months. Plaintiff testified that after returning to work in April 1978, he had not experienced any difficulties with his back, that as a result of his injuries he "usually ended up on a little easier job" than some of his co-workers, but that the railroad physician had not placed any restrictions on his activities other than telling plaintiff that he himself knew what he was and was not able to do. After the December 1, 1980 injury, plaintiff again underwent surgery. He has been disabled ever since the injury and requires continued medical care.

On July 8, 1981, plaintiff brought this FELA action in federal district court. The case was tried to a jury which returned a verdict in favor of plaintiff in the amount of $95,000. The judgment, however, was reduced by 75% to $23,750 when, in response to special interrogatories, the jury found that plaintiff had been 75% contributorily negligent. On appeal, plaintiff argues: (1) that the trial court erred in submitting the issue of plaintiff's contributory negligence to the jury; (2) that the court erred in instructing the jury not to engage in speculation or conjecture; and (3) that the evidence permitted a charge of *res ipsa loquitur*. We consider each assignment of error in turn.

II.

Plaintiff claims that defendant failed to present sufficient evidence of contributory negligence to create a jury question. According to plaintiff, any evidence produced by defendant relating to plaintiff's conduct was relevant only to the defense of assumption of risk rather than to the defense of contributory negligence. Of course, neither assumption of risk nor contributory negligence is a defense in a FELA case. 45 U.S.C. §§ 53-54 (1982). But any

finding of contributory negligence will reduce the plaintiff's award in proportion to the amount of negligence attributable to the employee. *Caillouette v. Baltimore & Ohio Chicago Terminal R. Co.*, 705 F.2d 243 (7th Cir. 1983).

Assumption of risk has been defined as the knowledgeable acceptance by an employee of a dangerous condition when such acceptance was necessary for the performance of duties. In contrast, contributory negligence has been defined as a careless act or omission on the part of the employee "superimposed" upon the necessary acceptance of these known dangerous conditions. *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 257 (2d Cir. 1973); *Mumma v. Reading Co.*, 247 F.Supp. 252, 256-7 (E.D. Pa. 1965). An employee cannot be charged with contributory negligence merely because he assumed the risk. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 71-72, 63 S.Ct. 444, 453 (1943) (Frankfurter, J., concurring); *Dixon v. Penn Central Co.*, 481 F.2d 833, 835 (6th Cir. 1973). But to be found free of contributory negligence, a plaintiff must have used such care for his safety as a reasonably prudent employee would have used under the circumstances. *Seaboard Airline Railway v. Horton*, 233 U.S. 492, 503, 34 S.Ct. 635 (1914); *Mroz v. Dravo Corp.*, 429 F.2d 1156, 1163 (3d Cir. 1970).

In determining whether the issue of contributory negligence was properly submitted to the jury, "[t]he question is not whether we would have reached the same conclusion as did the jury but rather whether there was sufficient evidence to permit the jury to reach the conclusion it did." *Caillouette v. Baltimore & Ohio Chicago Terminal R. Co.*, 705 F.2d 243, 247 (7th Cir. 1983) (quoting *Heater v. Chesapeake & Ohio Railway Co.*, 497 F.2d 1243, 1247 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974)).

In reviewing the record, we have ample evidence from which the jury reasonably could infer that plaintiff was contributorily negligent. First, the evidence showed that plaintiff had a history of serious back injuries and was able to curtail his activities at work to avoid placing undue stress on his back. His foreman, Dennis Rasnake, testified that he would have attempted to assign plaintiff to another task if plaintiff had advised him that he was unable to do the work because of prior problems with his back. Plaintiff's supervisor, Bill Todd, stated that the foreman generally attempts to permit the employees to choose the job which they prefer and that either plaintiff's foreman, Rasnake, or plaintiff chose the job of spikeman on December 1, 1980. A jury can find an employee contributorily negligent when the employee knowingly exposes himself to conditions of employment while aware of a disability which makes those conditions unsafe to him, or where he has the possibility of securing relief from unsafe conditions by informing his superiors of them, but continues to work. *Savoie v. Olto Candies, Inc.*, 692 F.2d 363 (5th Cir. 1982); *Mroz v. Draco Corp.*, 429 F.2d 1156 (3d Cir. 1970); *Du Bose v. Matson Navigation Co.*, 403 F.2d 875 (9th Cir. 1968).

In addition, defendant introduced evidence that the plaintiff failed to follow certain safety rules. Tom Beckner, plaintiff's co-worker, testified that one rule promulgated by defendant explained the proper manner of bracing oneself to avoid being jarred when swinging the sledge hammer. Plaintiff himself testified that he had a copy of defendant's safety rules governing the proper use of sledge hammers, but that he was not aware of their content. Thus there was sufficient evidence for the jury to conclude that plaintiff negligently failed to consult or follow the safety rules governing the proper performance of his job.

Finally, during cross-examination, defense counsel demonstrated the method that plaintiff had used to swing the sledge hammer and then an alternative method of swinging the sledge hammer. Plaintiff stated that he had not swung the sledge hammer using the alternative method. The jury reasonably could have concluded that the better method was the alternative described by defense counsel and that plaintiff's failure to use that method constituted negligence.[1]

Contrary to plaintiff's position, the acts or omissions described above cannot be considered to be assumptions of risk. Failure to consult or follow a safety rule or to employ a safer alternative method certainly cannot be described as acceptance of a dangerous condition "necessary for performance of his duties." Nor may plaintiff's failure to request a less strenuous job or to advise the foreman of prior injuries be described as acts constituting assumption of the risk. Rather, plaintiff's conduct involved these omissions superimposed upon the condition created by the employer and therefore could be found by the jury to constitute contributory negligence.

III.

The district judge instructed the jury not to "guess or speculate as to the cause of the result in question" and that a "verdict based upon mere possibilities, conjecture, or surmises would violate the oath" which they had taken. He further instructed the jurors that plaintiff

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1. Plaintiff correctly notes that the district court relied upon facts not in evidence in determining this issue. The district court stated: "Plaintiff denied that this [method] was the proper way, but Tom Beckner and Bill Todd testified that this was the proper way to swing a sledge hammer." There was no such testimony by either witness. This error, resulting from the adoption of misstatements of evidence in defendant's memorandum, was unfortunate, but does not require reversal.

had the "burden to show by a fair preponderance of the evidence that the defendant is responsible according to the facts presented at trial . . . ." In objecting to this instruction, plaintiff relied upon *Lavender v. Kurn*, 237 U.S. 645 (1946), as support for his contention that a jury should be permitted so to speculate. But *Lavender* does not support plaintiff's position. The Supreme Court in *Lavender* stated only that "[w]henever facts are in dispute . . . , a *measure* of speculation and conjecture is required . . . ." 327 U.S. at 653 (emphasis added). The Court did not, however, advocate *mere* speculation; rather, it required an evidentiary basis for the jury's verdict. *Id.* Jury verdicts that are based upon mere speculation cannot be upheld. *Kuberski v. New York Central Railroad Co.*, 359 F.2d 90 (2d Cir. 1966). The jury instruction in the instant case, when read as a whole, does not forbid any speculation. The instruction correctly limits the measure to which a jury can engage in conjecture and speculation by prohibiting mere speculation and requiring a verdict based upon a preponderance of the evidence. We find no error in the court's instruction.

IV.

Finally, plaintiff contends that the trial court erred in failing to instruct the jury on the doctrine of *res ipsa loquitur*. Plaintiff reasons that a derailment damaged the rail spikes that plaintiff was lifting when he incurred his injury; plaintiff was required to use the more hazardous method to lift spikes as a result of the derailment; the defendant had exclusive possession and control of the train and the tracks involved in the derailment; a derailment ordinarily does not occur in the absence of negligence; therefore, injuries arising out of the more hazardous method would have been subject to the doctrine of *res ipsa loquitur*. In short, plaintiff argues that because

the derailment prevented plaintiff from using the less hazardous method (the hydraulic spike lifter) to lift the spikes, he was entitled to avail himself of the doctrine of *res ipsa loquitur.*

Res ipsa loquitur is a rule of evidence which permits inferences from unexplained events. *Johnson v. United States,* 333 U.S. 46, 48-49 (1948); *Fassbinder v. Pennsylvania R. Co.,* 332 F.2d 859, 863-64 (3d Cir. 1963). Three prerequisites must be met to properly invoke the doctrine: (1) the accident must be of the type which ordinarily would not occur in the absence of negligence; (2) the injury must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) the occurrence must not have been due to any voluntary action by the plaintiff. *Dugas v. Kansas City Southern Railway Lines,* 473 F.2d 821, 824, *rehg. denied,* 475 F.2d 1404 (5th Cir.), *cert. denied,* 414 U.S. 823 (1973). *See also Jesionowski v. Boston & Maine Railroad,* 329 U.S. 452, 456 (1946). None of these elements is present in this case. There is no event or occurrence that can be described as inexplicable. Plaintiff clearly injured his back while lifting the rail spikes, and none of the possible causes of plaintiff's injury can be said to have been exclusively under defendant's control. Indeed, as discussed above, plaintiff's injuries could have been due, at least in part, to his own voluntary actions.[2]

The district court properly denied plaintiff's motion for a new trial. Accordingly, the judgment of the district court is

AFFIRMED

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2. The parties dispute whether a derailment warrants application of the doctrine. But this dispute is beside the point because the derailment did not cause plaintiff's injuries. Although the derailment may have created some of the conditions which eventually led to the occurrence, the derailment itself was too remote to properly be considered the cause of plaintiff's injuries.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

(Dated June 30, 1982)

No. S81-0205

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND, INDIANA

WILTON JOHNSON

VS.

CONSOLIDATED RAIL CORPORATION

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly tried and jury having duly rendered its verdict,

It is Ordered and Adjudged that the Plaintiff, Wilton Johnson, recover of the Defendant, Consolidated Rail Corporation, the sum of $23,750.00, with interest thereon at the legal rate as provided by law, and his costs of action.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

(Filed July 15, 1982)

No. S 81-205

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND, INDIANA

WILTON JOHNSON,
Plaintiff,

CONSOLIDATED RAIL CORPORATION,
Defendant.

ORDER

Plaintiff states in his memorandum that the only evidence offered by defendant in regard to the issue of contributory negligence was that plaintiff bumped onto the job of a trackman knowing of the risks inherent in some of the potential work.

Upon direct examination by plaintiff's attorney, plaintiff's attorney demonstrated to plaintiff before the jury, as to how plaintiff swung the sledge hammer and this demonstration showed the holding of the sledge hammer with two hands next to each other and plaintiff acknowledged that this was how he swung the sledge hammer. Upon cross-examination, defendant's attorney demonstrated to plaintiff how the sledge hammer could be held with one hand at the bottom of the handle and the other hand near the sledge part of the hammer and as the hammer is swung,

the handle slides through the hand which allows the weight of the sledge to do the work of force and thrust. Plaintiff denied that this was the proper way, but Tom Beckner and Bill Todd testified that this was the proper way to swing a sledge hammer. Based on this evidence and demonstration, the jury could have properly concluded that he was 75% negligent.

There was also testimony in the case that certain safety rules were involved as far as bracing yourself when swinging a sledge hammer. Plaintiff admitted that there were safety rules and he did not know the exact content of these rules, but he admitted that it was necessary to brace yourself while swinging the sledge hammer. The jury could have determined that plaintiff did not properly brace himself when he did swing the sledge hammer, and this is another basis for its finding that plaintiff was contributorily negligent.

Plaintiff argued that defendant was negligent in allowing plaintiff to work as a trackman because of his two prior back surgeries, yet plaintiff now complains that defendant cannot argue that plaintiff was contributorily negligent by undertaking the job of swinging a sledge hammer which was a duty that was well-known to plaintiff from the day he started with the railroad as a trackman in 1975. Plaintiff cites as authority for his position that contributory negligence is not a part of this case. *Mumma v. Reading Co.*, 247 F. Supp. 252, 254-257 (E.D. Pa. 1965). However, the plaintiff fails to point out that the *Mumma* case involved two work related injuries in which the court found in one of the injuries that there was sufficient evidence of contributory negligence. In the *Mumma* case, the court gives several definitions of contributory negligence. On page 256 of the *Mumma* case, the court defines assumption of risk:

> Under ordinary circumstances, the knowledgeable acceptance by an employee of a dangerous condition when such acceptance is necessary for the performance of his duties is assumption of risk.
>
> *Mumma v. Reading Company*, 247 F. Supp. 252, p. 256-257.

The court comments on contributory negligence as follows:

> Contributory negligence, on the other hand, implies a careless act or omission on the part of the servant superimposed upon the mere necessary acceptance of known conditions negligently created or permitted to exist by the employer.
>
> *Mumma v. Reading Company*, 247 F. Supp. 252, p. 257.

The court also stated that:

> Contributory negligence is an act or omission on the plaintiff's part tending to a reasonable probability to add new dangers to his situation, not necessarily incident to the known defective conditions, and bringing upon himself a harm not caused solely by them, but created in part at least by his own misconduct.
>
> *Mumma v. Reading Company*, 247 F. Supp. 252, p. 257.

In this case, plaintiff not only bumped for his position as a trackman, knowing that he had two previous back surgeries, but he admitted that he did not request that he not be assigned the duty of swinging a sledge hammer. There was also sufficient evidence in the case that plaintiff was free to choose whatever assignment was available on that day as a trackman. There was further evidence

that if plaintiff had remonstrated against taking the job of swinging a sledge hammer, Bill Todd, the supervisor, would have attempted to give him another job.

Under one of the definitions of contributory negligence, plaintiff committed a careless act or omission superimposed upon the mere necessary acceptance of known conditions negligently created or permitted to exist by the employer. In other words, plaintiff bumped for the job of a trackman and undertook to swing a sledge hammer with full knowledge of his prior back condition, when plaintiff had the choice of requesting a different assignment or waiting until another job arose as a machine operator. The court gave instruction number 30 which advised the jury that the plaintiff could not be held to have assume [sic] any of the risks of his employment. There is a presumption that the jury followed the instructions of the court. Therefore, the jury knew that assumption of risk was not a defense.

Plaintiff complains of the court giving the instruction on conjecture, more possibilities, etc. In support of plaintiff's position, plaintiff cites *Lavender v. Kurn*, 327 U.S. 645 (1946). However, *Lavender v. Kurn* does not support plaintiff's position. All *Lavender v. Kurn* says is that there is always a measure of speculation and conjecture when there is conflicting evidence. The court's instruction number 18 instructs the jury that they must base their decision upon a fair preponderance of the evidence and according to the facts presented at trial and according to the law given by the court. This instruction is sound in law and is supported by the other jury instructions. Even if this instruction was error, it would be harmless in view of the fact that a verdict was rendered in favor of the plaintiff.

Plaintiff's argument on the failure to give the instruction on res ipsa loquitur is contradictory to the result

in this case. Since the jury found in favor of the plaintiff, the jury did, in fact, make a finding that the defendant was negligent. Therefore, the failure to give the instruction on res ipsa loquitur is moot and harmless.

In support of plaintiff's argument that the court should have given such an instruction, the plaintiff cites *Jesionowski v. B & M Railroad Co.*, 329 U.S. 452. *Jesionowski* does not support plaintiff's position. In that case the railroad employee was injured when he was thrown from the car that was derailed. In this case, it is alleged that railroad cars were derailed, causing smashed spikeheads. The doctrine in res ipsa loquitur should not be invoked since the evidence in this case was clear that it is not unusual for railroad cars to derail as a result of accidents, product defects, etc. Bill Todd testified to the effect that derailments are not unusual.

Plaintiff argues that there were five items of undisputed evidence to support his argument that the damage award was inadequate. Plaintiff does not take into consideration other items of undisputed evidence as follows:

1. Plaintiff was furloughed every year he worked as a trackman for at least three months.

2. Doctor Sobol testified that because of plaintiff's prior back injuries and surgeries, he doubted if plaintiff could continue work as a trackman (prior to the third injury) for 16 more years. There is undisputed testimony from Bill Todd that the railroad was cutting down on the number of trackmen and that plaintiff would have been eventually eliminated from consideration as a trackman because he lacked the seniority necessary to hold this position.

3. Plaintiff was eligible to work in other types of jobs such as a clerk, counterman, etc., and the income derived from other types of employment could be offset against what plaintiff would make as a trackman. This evidence as [sic] given by Doctor Sobol, as well as by plaintiff's economist. Plaintiff argues that his insurance coverage was cut off because he lost his job when fired by defendant. However, the firing of plaintiff was for just cause and, therefore, plaintiff was the cause of his loss of insurance benefits.

This case was well and vigorously tried by able counsel for both parties. The jury was compelled to make choices as to credibility and weight. The inferential choices made by the jury were within the law and the evidence. No error was committed that compels this court to grant a new trial. There are clear inferences of fact which support the verdict of the jury.

The plaintiff's motion for new trial is DENIED. The judgment entered on the verdict stands. SO ORDERED.

Enter July 15, 1982.

/s/ ALLEN SHARP
Chief Judge, United States District Court

JUDGMENT OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Dated September 5, 1984)

No. 82-2246

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BEFORE

HON. WALTER J. CUMMINGS, *Chief Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. JESSE E. ESCHBACH, *Circuit Judge*

WILTON JOHNSON,
Plaintiff-Appellant,

VS.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Indiana, South Bend Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

STATUTES INVOLVED

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

TRIAL COURT'S INSTRUCTION ON NO SPECULATION

* * * * *

[520] The law does not permit you to guess or speculate as to the cause of the result in question. A verdict based upon mere possibilities, conjecture, or surmises would violate the oath which you have taken as jurors in this case. Plaintiff has the burden to show by a fair preponderance of the evidence that the Defendant is responsible according to the facts presented at trial and according to the law as given to you by the Court.

* * * * *

TRIAL COURT'S INSTRUCTION ON CONTRIBUTORY NEGLIGENCE

* * * * *

[521] Contributory negligence is negligence on the part of the Plaintiff, which, combining with the negligence of a Defendant, contributes as a proximate cause in bringing about the injury.

The issues to be determined by the Jury in this case are these:

First: Was the Consolidated Rail Corporation negligent in one or more of the particulars alleged?

[522] If your unanimous answer to that question is "No", you will return a verdict for the Defendant; but if your unanimous answer is "Yes", you then have a second issue to determine, namely:

Second: Did the negligence of the Defendant cause or contribute to any injury and damage to the Plaintiff?

If your unanimous answer to that question is "No," you will return a verdict for the Defendant; but if your unanimous answer is "Yes", you must then find the answer to a third question, namely:

Third: Was the Plaintiff guilty of some contributory negligence?

If you should find that he was not, then, having found in the Plaintiff's favor in answer to the first two questions, you will proceed to determine the amount of Plaintiff's damages, and return a verdict in the Plaintiff's favor for that amount.

On the other hand, if you should find, from a preponderance of the evidence in the case, that the Plaintiff himself was guilty of some contributory negligence, and that the Plaintiff's fault caused or contributed to any injuries which Plaintiff may have sustained, then you must compare the negligence of the parties, and return a verdict in favor of the **[523]** Plaintiff for a reduced amount, based upon the comparison.

The Defendant, Consolidated Rail Corporation, does not insure nor guarantee its employees against the possibility of accident. It can be held liable only if you find it failed to perform a duty imposed by law as stated in these instructions.

Section 3 of the Federal Employers' Liability Act provides in part that:

> "In all actions * * * brought against any * * * common carrier by railroad * * * to recover damages for personal injuries to an employee, * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the Jury in proportion to the amount of negligence attributable to such employee."

So if you should find, from a preponderance of the evidence in the case, that the Consolidated Rail Corporation was guilty of negligence which caused, in whole or in part, any injury or damage to the Plaintiff; and should further find, from a [524] preponderance of the evidence in the case, that the Plaintiff himself was guilty of some contributory negligence which contributed toward bringing about all or a part of his own injury; then the total award of damages to the Plaintiff must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the Plaintiff.

FILED
DEC 18 1984
ALEXANDER L. STEVAS

No. 84-859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILTON JOHNSON,

Petitioner,

VS.

CONSOLIDATED RAIL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BEST AVAILABLE COPY

THE PETITION FOR A WRIT OF CERTIORARI FAILS TO COMPLY WITH RULE 17 AND RULE 21.1(j) OF THE RULES OF THE UNITED STATES SUPREME COURT

No. 84-859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILTON JOHNSON,

Petitioner,

VS.

CONSOLIDATED RAIL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

Petitioner has failed to comply with Rule 21.1(j) of the Rules of the Supreme Court of the United States in that Petitioner has failed to include in his Petition for Writ of Certiorari a direct and concise argument amplifying the reasons relied on for the allowance of the Writ.

Rule 17, of the Rules of the Supreme Court of the United States provides:

> ".1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last report or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."

The United States Court of Appeals for the Seventh Circuit has not rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; has not decided a Federal question in a way in conflict with a state court of last resort; has not so far

departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power and supervision.

This action does not involve any action on the part of a state court.

The United States Court of Appeals for the Seventh Circuit has not decided an important question of Federal law which has not been, but should be, settled by this Court, or has not decided a Federal question in a way in conflict with applicable decisions of this Court.

Therefore, since Petitioner has failed to comply with Rule 21 and has failed to come under Rule 17, his Petition for Writ of Certiorari should be denied instanter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon J. B. Blumenstiel, Counsel for Petitioner, of Grieser Schafer, Blumenstiel & Slane Co., L.P.A., 261 West Johnstown Road, Columbus, Ohio 43230 by an agent of Byron S. Adams, by depositing same in the United States mail this ____ day of December, 1984 postage prepaid.

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